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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

FRANKLIN ENG, Plaintiff, Cross-defendant, and Appellant, v. MICHAEL PATRICK BROWN et al., Defendants, Cross-complainants and Appellants.	D072980 (Super. Ct. No. 37-2011-102213-CU-MC-CTL)

APPEALS from a postjudgment order of the Superior Court of San Diego County, Katherine A. Bacal, Judge. Affirmed.

Law Offices of Edwin Paul, Edwin Paul and Margie L. Jesswein for Defendants, Appellants and Cross-Respondents.

Fischbach & Fischbach and Joseph S. Fischbach for Plaintiff, Respondent, and Cross-Appellant.

Following a jury trial, the trial court entered judgment in favor of defendants Michael Patrick Brown and Gerald Levy (together Defendants) and against plaintiff

Franklin Eng (Plaintiff), and in a March 2018 opinion in case No. D071773, this court affirmed the judgment in *Eng v. Brown* (2018) 21 Cal.App.5th 675 (*Eng I*).

After the judgment and before *Eng I*, Defendants filed a motion to recover attorney fees and other litigation expenses against Plaintiff or his attorney under Code of Civil Procedure section 128.5 (expenses for prosecuting a frivolous action; subsequent undesignated statutory references are to this code) and against Plaintiff under section 2033.420 (expenses incurred in proving the truth of a matter denied in a response to a request for admission). Plaintiff substantively opposed the motion, including a request under section 128.7, subdivision (h), for sanctions against Defendants and their attorneys for having brought a frivolous section 128.5 motion for an improper purpose.

The trial court denied Defendants' motion in its entirety and did not rule on Plaintiff's request. Defendants and Plaintiff have appealed from the order.

As we explain, the trial court did not abuse its discretion. Defendants did not meet their burden of establishing an entitlement to an award of reasonable expenses under section 2033.420; and Plaintiff did not file a proper motion for sanctions under section 128.7. Accordingly, we will affirm the postjudgment order denying Defendants' section 2033.420 motion.

I. FACTUAL AND PROCEDURAL BACKGROUND[1]

A. *The Judgment and the Prior Appeal from the Judgment*

Plaintiff and Levy were both licensed real estate agents, who at times worked together in the early 2000's. (*Eng I, supra*, 21 Cal.App.5th at p. 683.) In 2006, Levy listed the Tin Fish Gaslamp restaurant for sale on behalf of its owner, and later that year, Plaintiff and Levy decided to purchase the restaurant themselves, along with Brown, who is Levy's nephew. (*Ibid.*) They agreed that Brown would own a majority of the business, 56.667 percent, Levy would own 33.333 percent, and Plaintiff would own 10 percent. (*Ibid.*)

In January 2007, the group submitted an offer to purchase the Tin Fish Gaslamp in the names of Brown and B.L.E. Fish, Inc. (B.L.E. Fish), a corporation; and the escrow instructions identified B.L.E. Fish as the buyer. (*Eng I, supra*, 21 Cal.App.5th at p. 684.) Later that month, Defendants held an organizational meeting for B.L.E. Fish, adopted bylaws, elected corporate officers and a board of directors (all positions being filled by Defendants), and approved the issuance of 100 shares of stock. (*Ibid.*) Two months later, Defendants and Plaintiff signed an election by B.L.E. Fish to be an S corporation under the Internal Revenue Code. (*Ibid.*) Levy filed a fictitious business name statement on behalf of B.L.E. Fish, which identified the Tin Fish Gaslamp name, described the business as being conducted by a corporation, and noted that the business had not yet

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1 We present many of the underlying events through judgment from our opinion in *Eng I, supra*, 21 Cal.App.5th 675, at times lifting language without using quotation marks.

started. (*Ibid.*) Brown eventually transferred the outstanding shares of B.L.E. Fish to himself, Levy, and Eng according to the percentage of their ownership interests—with Brown receiving 56.667 shares, Levy 33.333 shares, and Plaintiff 10 shares. (*Ibid.*)

Following the close of escrow in April 2007, Defendants and Plaintiff executed a management agreement, which provided in part that Defendants had " 'the exclusive authority to oversee the restaurant business and all daily operations of Tin Fish Gaslamp' " and authorized Defendants " 'to make all decisions for the restaurant on behalf of B.L.E.[,] Fish Inc.' " (*Eng I, supra*, 21 Cal.App.5th at p. 684.)

From 2007 through 2010, Plaintiff received distributions from B.L.E. Fish. (*Eng I, supra*, 21 Cal.App.5th at p. 684.) Apparently dissatisfied with his distributions in 2011, however, Plaintiff sued Defendants, initiating the underlying superior court action and alleging the following three causes of action based on Plaintiff's understanding that he and Defendants had entered into a partnership to run the Tin Fish Gaslamp: partnership dissolution and accounting; constructive fraud (based on breaches of fiduciary duties Defendants owed Plaintiff " '[b]y virtue of the joint venture agreement' " to own and manage the restaurant); and conversion. (*Id.* at p. 685.) Defendants' position "throughout the litigation" was "that no partnership was formed and, in the alternative, if a partnership was formed it was superseded by the incorporation of B.L.E. Fish." (*Id.* at p. 700.) Plaintiff later filed a first amended complaint, which added as fourth and fifth causes of action "an 'alternative' cause of action for involuntary dissolution of a corporation and an 'alternative' shareholder derivative claim for breach of fiduciary duty against [Defendants] on behalf of B.L.E. Fish." (*Id.* at p. 685.) Shortly thereafter,

Plaintiff voluntarily dismissed his fourth cause of action for involuntary corporate dissolution. (*Id.* at p. 686.)

Defendants demurred to the remaining four causes of action in the amended complaint on the basis that none stated facts sufficient to constitute a cause of action. (*Eng I*, *supra*, 21 Cal.App.5th at p. 685.) Consistent with their position throughout this case, Defendants argued that no partnership or joint venture ever existed among the parties, but that " '[e]ven if Plaintiff is correct in asserting the parties were joint venture partners prior to the formation of the corporation, the general rule is well established that a partnership does not continue to exist after the formation of a corporation' "—here, B.L.E. Fish. (*Id.* at pp. 685-686.) Overruling the demurrer as to the first, second, and fifth causes of action, in February 2013 the court sustained without leave to amend the demurrer to the third cause of action for conversion on the basis that, *regardless whether the business was a partnership or a corporation*, the fact that Plaintiff may not have received distributions to which he was entitled did not establish that Defendants converted *his* (as opposed to the business's) money. (See *id.* at p. 686.)

Plaintiff dismissed the first, second, and fifth causes of action in November 2016, going to trial on the second cause of action for constructive fraud—which the judgment describes as a cause of action "based upon a breach of fiduciary duty owed to [P]laintiff as an alleged partner or joint venture[r] against [D]efendants[.]" After 11 days of trial, the jury returned a special verdict, answering " 'yes' " to the following two questions: (1) " 'Do you find that the parties entered into a partnership or joint venture in 2006?' "; and (2) " 'Do you find that the parties terminated their partnership or joint venture with

the formation of B.L.E. Fish, Inc.? '" (*Eng I, supra*, 21 Cal.App.5th at pp. 692-693.) Based on those answers, the court entered judgment in favor of Defendants and against Plaintiff. (*Id.* at p. 693.)

Plaintiff appealed, and in March 2018, we affirmed the judgment in *Eng I, supra*, 21 Cal.App.5th 675. Although the opinion dealt with numerous and varied pretrial, trial, and posttrial issues, as relevant to a basic understanding of the principal issue in the present appeal, we rely on the following discussion:[2]

> "[Plaintiff] argues that [Defendants] were required to offer evidence that the partners specifically agreed to terminate the partnership and replace it with B.L.E. Fish. [Plaintiff's] argument appears to rely on a misinterpretation of the parties' respective burdens of proof. To support their affirmative defense of supersession[—namely, that the incorporation of B.L.E. Fish superseded any partnership or joint venture that had been formed—]Defendants needed to prove only that the partnership incorporated. [Citation.] [Plaintiff] could rebut this affirmative defense by showing that the parties had a preincorporation agreement to continue the partnership notwithstanding the formation of the corporation. [Citation.] But to obtain a [favorable] verdict on this basis, [Plaintiff] would have had to have shown that the existence of a preincorporation agreement to maintain the partnership was essentially uncontested, i.e., there was ' "no substantial support" ' for [Defendants'] position that no such preincorporation agreement existed. [Citation.] He has made no effort to do so. Instead, [Plaintiff] has relied on his belief that [Defendants] were required to *disprove* the existence of a preincorporation agreement as part of their defense of supersession. . . . [Plaintiff's] belief was in error." (*Eng I, supra*, 21 Cal.App.5th at pp. 702-703.)

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2 The typewritten opinion is 49 pages and contains a discussion of 11 separately numbered issues. In various contexts, the opinion discussed a principal issue of contention—namely, the burdens of proof under partnership/corporate law on the cause of action that went to the jury. (*Eng I, supra*, 21 Cal.App.5th at pp. 702-707 [pts. IV-VI].) In the text, *post*, we set forth the proper standards and their effect on the judgment.

Eng I concluded that the proof Plaintiff argued Defendants were required to produce—"i.e., a specific intent or agreement to terminate the partnership"—would have become relevant only if Plaintiff had presented evidence that, *prior to incorporating B.L.E. Fish*, the parties had agreed to continue the partnership *after* the incorporation. (*Id.* at p. 703, fn. 7, citing *Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1157, 1159 (*Persson*); *Elsbach v. Mulligan* (1943) 58 Cal.App.2d 354, 368-369 (*Elsbach*).) "However, because [Plaintiff] did not establish that the parties entered into a preincorporation agreement to continue the partnership, the burden never shifted back to [Defendants] to rebut that showing." (*Eng I,* at p. 703, fn. 7.)

The jury's answers to the two special verdict questions confirmed *both* the original establishment of a partnership (as Plaintiff contended) *and* the lack of a preincorporation agreement to continue the partnership after incorporating B.L.E. Fish (as Defendants contended). As we explained in *Eng I*, "the general rule [is] that incorporation terminates the partnership relationship. (*Elsbach*, *supra*, 58 Cal.App.2d at p. 368.) . . . If incorporation is shown, the burden shifts back to the proponent of the partnership to prove that the parties entered into a preincorporation agreement or otherwise intended for their partnership to survive incorporation because the 'ordinary principle' is that the partnership would not survive. (*Persson*, *supra*, 125 Cal.App.4th at p. 1159.)" (*Eng I*, *supra*, 21 Cal.App.5th at p. 704.) In burden-of-proof terms, therefore, the jury determined that Plaintiff met his burden of establishing a partnership or joint venture in 2006, that Defendants met their burden of establishing that the parties later formed a corporation (B.L.E. Fish), and that Plaintiff did not meet his responsive burden of

establishing that, *prior* to incorporating B.L.E. Fish, the parties agreed to continue the partnership relationship *after* the incorporation.

B. *Defendants' Postjudgment Motion for Costs of Proof (§ 2033.420); Plaintiff's Postjudgment Request for Sanctions (§ 128.7, Subd. (h))*

In postjudgment proceedings which took place at least a year before the filing of *Eng I*, *supra*, 21 Cal.App.5th 675, Defendants filed a motion for reasonable fees and expenses under both section 2033.420 (improper denial of requests for admission) and section 128.5 (sanctions for bad faith). As relevant to the issues in this appeal, Defendants' section 2033.420 motion sought reasonable expenses, including attorney fees, incurred in proving the truth of matters denied by Plaintiff in his responses to certain of Defendants' requests for admissions (at times, costs of proof). Plaintiff opposed Defendants' motion, presenting substantive arguments and requesting sanctions against Defendants and their attorneys under section 128.7, subdivision (h), for having brought a frivolous section 128.5 motion for an improper purpose.

In a July 2017 minute order, the trial court denied Defendants' motion on a number of grounds. The court did not rule on Plaintiff's section 128.7, subdivision (h) request for sanctions.

Defendants timely appealed from the order, and Plaintiff timely cross-appealed from the order.

II. DISCUSSION

In their appeal, Defendants contend that the trial court erred in denying their motion for costs of proof under section 2033.420.[3] In his cross-appeal, Plaintiff contends that the trial court erred in denying his request for sanctions under section 128.7, subdivision (h). As we explain, neither side met its burden of establishing reversible error.

A. *Defendants' Appeal: Defendants' Motion for Costs of Proof (§ 2033.420)*

In their appeal, Defendants argue that the trial court erred in denying their section 2033.420 costs of proof, because the requested award was *mandatory* unless Plaintiff demonstrated that his denial of the requests for admission was justified, and Plaintiff did not establish the requisite showing of justification. The trial court did not err.

As to most of the requests for admission, Defendants did not meet their *initial burden* under subdivision (a) of section 2033.420 of directing the trial court to what they contended was evidence of *the proof* of the truth of the matters Plaintiff denied. Thus, the burden never shifted to Plaintiff under subdivision (b) of section 2033.420 to establish one of the statutorily acceptable reasons for denying the subject requests for admission.

As to another group of three requests for admission (directed to Plaintiff's cause of action for conversion), we will assume that Defendants met their burden of directing the court to their proof of the matters Plaintiff denied. (§ 2033.420, subd. (a).) However,

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[3] In their opening brief on appeal, Defendants expressly waived review of the section 128.5 ruling, leaving at issue only the ruling on their section 2033.420 motion.

because Defendants did not present evidence of the costs of proof limited to the one cause of action for conversion, Defendants did not meet the remainder of their *initial burden* under subdivision (a) of section 2033.420. Thus, once again, the burden never shifted to Plaintiff to establish a statutorily acceptable reason for denying the matters at issue under subdivision (b) of section 2033.420.

1. *Law*

A party to a civil action may propound a written request that another party "admit . . . the truth of specified matters of fact, opinion relating to fact, or application of law to fact." (§ 2033.010.)

Correspondingly, "[i]f a party fails to admit . . . the truth of any matter when requested to do so under [section 2033.010], and if the party requesting that admission thereafter proves . . . the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees." (§ 2033.420, subd. (a).) Indeed, upon a sufficient showing under subdivision (a) by the party requesting the admission, subdivision (b) *requires* the trial court to make such an order against the responding party, "unless [the court] finds any of the following: [¶] (1) An objection to the request was sustained or a response to it was waived under Section 2033.290. [¶] (2) The admission sought was of no substantial importance. [¶] (3) The party failing to make the admission had reasonable ground to believe that that party would prevail on the matter. [¶] (4) There was other good reason for the failure to admit." (§ 2033.420, subd. (b).)

Requests for admission differ in purpose from other commonly used discovery devices, because "requests for admission are 'not really a discovery procedure.' " (*City of Glendale v. Marcus Cable Associates, LLC* (2015) 235 Cal.App.4th 344, 352 (*City of Glendale*).) Whereas other forms of discovery (depositions, interrogatories, inspection demands, medical examinations, expert witness exchanges) principally seek to *obtain* proof for use at trial, requests for admission seek to *eliminate* the need for such proof. (*Id.* at p. 352, fn. 5.) "[T]he purpose of the admissions procedure . . . is to limit the triable issues and spare the parties the burden and expense of litigating undisputed issues." (*Shepard & Morgan v. Lee & Daniel, Inc.* (1982) 31 Cal.3d 256, 261; accord, *City of Glendale*, at p. 352, fn. 5.)

The basis for imposing costs of proof sanctions under section 2033.420 is directly related to this purpose: " 'Unlike other discovery sanctions, an award of expenses pursuant to [section 2033.420] is not a penalty. Instead, it is designed to reimburse reasonable expenses incurred by a party in proving the truth of a requested admission where the admission sought was "of substantial importance" [citations] such that trial would have been expedited or shortened if the request had been admitted.' " (*Orange County Water Dist. v. Arnold Engineering Co.* (2018) 31 Cal.App.5th 96, 115 (*Orange County Water Dist.*).) Because of their purpose, " '[r]equests for admission are not restricted to facts or documents, but apply to conclusions, opinions, and even legal questions.' " (*Ibid.*)

As applicable to the present appeal, in addition to other requirements, under section 2033.420, *subdivision (a)*, the party seeking an award of costs of proof sanctions

has the *initial* burden of establishing "that it actually proved the matter" covered by the request for admission. (1 Hogan & Weber, Cal. Civil Discovery (2d ed. 2018 Supp.) Requests for Admission, § 9.21, pp. 100-101; accord, *id*. (2d ed. 2005) p. 9-57 ["the requesting party must *first* prove . . . the truth of the matter covered by the request" (italics added)].) For purposes of this showing, section 2033.420 "clearly vests in the trial judge the authority to determine whether the party propounding the admission thereafter proved the truth of the matter which was denied." (*Garcia v. Hyster Co.* (1994) 28 Cal.App.4th 724, 735 (*Garcia*) [under predecessor to § 2033.420]; accord, *Stull v. Sparrow* (2001) 92 Cal.App.4th 860, 864 (*Stull*) [trial court determines whether the propounding party has *proven* the matter at issue]; see *Wagy v. Brown* (1994) 24 Cal.App.4th 1, 6 ["Expenses are recoverable only where the party requesting the admission 'proves . . . the truth of that matter' " (quoting predecessor to § 2033.420, subd. (a))].) "Proof is something more than just evidence. It is the establishment of a fact in the mind of a judge or jury by way of evidence. [Citation.] Until a trier of fact is exposed to evidence and concludes that the evidence supports a position, it cannot be said that anything has been proved." (*Stull*, at pp. 865-866.)

Also applicable to the present appeal, under section 2033.420, *subdivision (a)*, the party seeking to recover costs of proof sanctions has the *initial* burden of presenting evidence of its "reasonable expenses incurred in making that proof" following the responding party's failure to admit. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2018) ¶ 8:1413.1, p. 8G-39 ["the moving party must set forth *specific facts supporting the amount* of costs and expenses sought"];

Garcia, *supra*, 28 Cal.App.4th at p. 737 [declaration setting out attorney's hourly fees and costs of proof required].) Importantly, the requested amounts must be segregated from all expenses incurred to prove other issues. (*Grace v. Mansourian* (2015) 240 Cal.App.4th 523, 529 (*Grace*); *Garcia*, at pp. 736-737 [recoverable expenses limited to those incurred in "proving the matters denied by the opposing party"].)

Only then—i.e., after the party seeking costs of proof expenses has established *both* that it actually proved the matter the responding party denied *and* that it incurred reasonable expenses in making that specific proof—does the burden shift to the party that denied the request for admission to demonstrate that the denial was justified under one of the four exceptions listed in *subdivision (b)* of section 2033.420. (1 Hogan & Weber, Cal. Civil Discovery (2d ed. 2005) Requests for Admission, § 9.21, p. 9-58 [*after* propounding party's showing, "an opponent who failed to make the admission may still avoid the cost-of-proof sanction" by an appropriate showing under § 2033.420, subd. (b)]; *Garcia*, *supra*, 28 Cal.App.4th at pp. 735-736 [burden of justifying denial of requests for admission impliedly placed on responding party].)

Courts "uniformly" have reviewed orders denying section 2033.420 costs of proof for an abuse of discretion.[4] (*Orange County Water Dist.*, *supra*, 31 Cal.App.5th at p. 118 [collecting cases].) " 'An abuse of discretion occurs only where it is shown that the trial court exceeded the bounds of reason. [Citation.] It is a deferential standard of review

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4 Courts applied the same (abuse of discretion) standard of review to orders granting and denying costs of proof awards under the predecessor to section 2033.420 (former § 2033, subd. (*o*)) and under the common law prior to the enactment of former section 2033, subdivision (*o*). (*Stull*, *supra*, 92 Cal.App.4th at p. 862, fn. 2.)

that requires us to uphold the trial court's determination, even if we disagree with it, so long as it is reasonable.' " (*Bloxham v. Saldinger* (2014) 228 Cal.App.4th 729, 753 [affirmed denial of costs of proof].) A trial court exceeds the bounds of reason "by applying an erroneous legal standard or by making a ruling unsupported by substantial evidence." (*People v. Armstrong* (2019) 6 Cal.5th 735, __ [2019 WL 419062, at *8].)

2. *Analysis*

As we first explain, Defendants did not meet their burden of demonstrating to the trial court where or how they *proved at trial* the matters that they contend Plaintiff unreasonably denied in his responses to requests for admission. (Pt. II.A.2.a., *post*.) As we then explain, even if we assume that Defendants *proved in demurrer proceedings* the matters that they contend Plaintiff unreasonably denied in certain of his responses, Defendants did not meet their burden of isolating any actual costs of proving the matters associated with those requests for admission. (Pt. II.A.2.b., *post*.)

a. *Defendants Did Not Prove* at Trial *Any Matters That They Contend Plaintiff Unreasonably Denied*

Defendants' costs of proof motion did not identify the specific requests for admission at issue. As exhibits to a declaration from Defendants' counsel that accompanied the motion, Defendants included copies of both sets (one and three) of requests for admission and all of Plaintiff's responses, including ultimately a denial for each request at issue. In their points and authorities in support of the motion, Defendants generally described the requests for admission at issue as follows:

> "In [D]efendants' RFA, Set No. 1 (Exhibit G), they requested the admission that the [P]laintiff had no evidence of the allegations of

> his complaint as alleged in paragraph 5 and portions of paragraph 6 (RFA No[s.] 1-8), which generally sets forth [P]laintiff's allegations of an oral joint venture agreement to acquire and run the restaurant and an oral agreement not to take salaries by the officers; that there was no evidence of any alleged theft by [D]efendants (RFA No[s.] 4-7); that there was no evidence that [P]laintiff's consent was required to modify officers' salaries; (RF[A] No. 8); that [P]laintiff was not an officer, or director of the corporation (RFA No[s]. 9-12); that there was no evidence of the facts contained in paragraph 13 of the complaint (RFA No[s]. 16-19) which generally state that [D]efendants are applying joint venture/partnership funds to their own use; that [P]laintiff did not own the money or right to possession of moneys allegedly converted (RFA No[s.] 23-25); that [P]laintiff was not harmed by [D]efendants taking salaries (RFA No. 26); that [D]efendants never held any monies for the benefit of plaintiff (RFA No. 27); and that [P]laintiff had no evidence of grounds to dissolve any alleged partnership (RFA No. 28). . . .
>
> "[¶] . . . [¶]
>
> "[D]efendants propounded a Third set of RFA[']s on [P]laintiff (Exhibit K), designed to obtain admissions that the alleged 'partnership/joint venture' was not a real entity as it had no taxpayer identification (RFA No. 29); never filed an income tax return (RFA No. 30); never had any income (RFA No. 31); never owned a bank account (RFA No. 32); never had a business license (RFA No. 33); never owned a liquor license (RFA No. 34); never had any employees (RFA No. 35); no writing refers to a partnership (RFA No[s]. 36- 37); and [P]laintiff is not entitled to dissolution of any partnership (RFA No. 40).
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> "In addition, [D]efendants sought admissions based upon the corporate derivative claim that [D]efendants did not engage in conduct intended to hide operating profit of the corporation (RFA Nos. 38-39); no financial records of the corporation were hidden (RFA No. 41); and, no corporate funds or funds belonging to [P]laintiff were misappropriated (RFA Nos. 42-44)."

After setting forth the law associated with section 2033.420 costs of proof awards, Defendants made the following showing—*in its entirety*—with regard to their proof of the above-described matters that Plaintiff denied:

> "In this case, the overwhelming evidence that the entity was a corporation and not a partnership and the law related to corporations and partnerships, demonstrate the unreasonableness of the denials made in this case."

Very simply, Defendants did not provide the trial court with trial transcripts, trial exhibits, or even references to testimony or documents that might have established what *evidence* was presented at trial that *proved* any specific matter that Plaintiff had denied.[5] A party, like Defendants here, charged with the burden of establishing that it actually

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[5] In the present appeal, Defendants' appellants' appendix contains: (1) a one-page document, which Defendants' index identifies as "Incorporation of Reporter's Transcript from Case No[.] D071773" (the appeal that resulted in *Eng I*, *supra*, 21 Cal.App.5th 675) dated May 15, 2017; and (2) a one-page document, which Defendants' index identifies as "Incorporation of Appellant's Appendix (AA) from Case No[.] D071773" dated June 30, 2017. These two one-page "Incorporation" documents—and, accordingly, the reporter's transcript and appendix—were not before the trial court for purposes of Defendants' motion, despite Defendants' inclusion of the two one-page "Incorporation" documents in their appendix in the present appeal.

Defendants filed their costs of proof motion on *March 1, 2017*, necessarily without mention of either the reporter's transcript or appendix in the appeal that resulted in *Eng I*, since the record indicates that they had not yet been prepared. Although the court did not decide Defendants' motion until a few weeks after the transcript and appendix were available, neither "Incorporation" document contains a case caption, a case number, or a file stamp; neither the parties nor the trial court mentioned the transcript or the appendix in writing or orally during the motion proceedings; the opening clause in each "Incorporation" document refers to an incorporation by reference under California Rules of Court, rule 8.124(b)(2)(A)—which applies only to the designation of the record in a pending appeal, *not to superior court proceedings* during the pendency of an appeal; and, most persuasively, *the register of actions does not indicate the filing (or lodging) of such an "Incorporation" document at or after the filing of Defendants' motion*.

"Filing an appendix constitutes a representation that the appendix consists of accurate copies of documents *in the superior court file*." (Cal. Rules of Court, rule 8.124(g), italics added; accord, *The Termo Co. v. Luther* (2008) 169 Cal.App.4th 394, 404 ["An appellant's appendix may only include copies of documents that are contained in the superior court file."].) Since neither of the one-page "Incorporation" documents was filed with the superior court, we strike them both. (Cal. Rules of Court, rule 8.124(g) ["The reviewing court may impose . . . sanctions for filing an appendix that . . . violates this rule."]; *The Termo Co.*, at p. 404.)

proved the matter covered by the request for admission that the opposing party denied (§ 2033.420, subd. (a)) may not—as Defendants have done here—just set forth the request and the denial and then refer generically to "the overwhelming evidence" at trial, emphasizing the favorable result.

Indeed, despite a judgment in favor of Defendants here, without a specific showing by Defendants as to the evidence at trial that they contended established sufficient proof a matter denied by Plaintiff for purposes of section 2033.420, subdivision (a), the trial court had no factual basis on which to have ruled that Defendants proved at trial the truth of *any* of the requests for admission at issue.[6]

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6 For example, in their briefing on appeal, Defendants emphasize their entitlement to costs of proving the truth of the matter in their "RFA No. 1." That request asked Plaintiff to admit that he "has no evidence to support the allegations of paragraph 5 of the complaint," which Defendants quote as follows: " 'In or about late 2006 Plaintiff and the individual defendants, Brown and Levy, entered into an oral joint agreement to acquire and operate a restaurant and bar in the City of San Diego that was known as the Tin Fish Gas Lamp. . . . *For purposes of the agreement of the parties, it was decided that the joint venture would own a Subchapter S corporation to obtain limited liability and to deal with third parties while the parties retained the status of partners as between themselves*. Thus, the sole asset of the joint venture is in fact the business of the restaurant and bar commonly known as the Tin Fish Gaslamp, San Diego.' " (Original italics.) Defendants then argue that the trial court erred in not awarding costs of proof sanctions on the basis that "Defendants proved *at trial* that there was no 'pre-incorporation agreement' that continued a purported joint venture/partnership post incorporation." (Italics added.) We disagree.

Preliminarily, Defendants forfeited appellate review of this argument by failing to have raised it in the trial court in support of their costs of proof motion. (*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1350, fn. 12 [" 'A party is not permitted to change his position and adopt a new and different theory on appeal.' "].)

In any event, *even if* we assume that Defendants had shown that they proved at trial there was no preincorporation agreement to continue the partnership, such a showing would have been insufficient to support a finding that they had proven the truth of the matter Plaintiff denied in his response to the request for admission. The first sentence of

Notably, in this appeal, Defendants have made a different presentation. Here, Defendants properly designated the reporter's transcript and appendices from the earlier appeal (*Eng v. Brown*, No. D071773) that resulted in *Eng I, supra*, 21 Cal.App.5th 675. (Cal. Rules of Court, rule 8.147(b).) More to the point, in their opening brief on appeal, Defendants often cited to the record from the earlier appeal—i.e., evidence from the trial that Defendants contend was *proof* of the matters they contend Plaintiff unreasonably denied. However, we decline to consider the showing Defendants have made on appeal *for the first time*, since "a reviewing court will ordinarily look only to the record made in the trial court." (*Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 325.) Any other result would be not only unjust to the respondent, but also unfair to the trial court. (*DiCola v. White Bros. Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 676.)

Accordingly, by Defendants' showing in the trial court—i.e., "In this case, the overwhelming evidence that the entity was a corporation and not a partnership and the law related to corporations and partnerships, demonstrate the unreasonableness of the

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paragraph 5 of the complaint alleged in part that Plaintiff and Defendants "entered into an oral joint venture agreement to acquire and operate a restaurant and bar in the City of San Diego that was known as the Tin Fish Gas Lamp"; and the jury's answer to the first special verdict question established that Plaintiff and Defendants "entered into a partnership or joint venture." Thus, the jury confirmed the accuracy of Plaintiff's denial of the request that he admit he "has no evidence to support the allegations of paragraph 5 of the complaint." The fact that Defendants may have proven *other parts* of the request that Plaintiff had denied—namely, that Plaintiff had no evidence to support *other allegations* in paragraph 5 of the complaint (e.g., "that the joint venture would own a Subchapter S corporation to obtain limited liability and to deal with third parties *while the parties retained the status of partners as between themselves*" (italics added))—does not establish that Defendants proved the truth of the matter that Plaintiff denied in his response to "RFA No. 1."

denials made in this case."—Defendants did not meet their initial burden under section 2033.420, subdivision (a). Defendants' showing in the trial court failed to establish that Defendants actually proved *at trial* any matter covered by the requests for admission that were the subject of Defendants' costs of proof motion.

Because Defendants did not meet their initial burden of establishing that they proved at trial the truth of a matter denied by Plaintiff (§ 2033.420, subd. (a)), the burden never shifted to Plaintiff to prove an exception to the mandatory award of reasonable expenses incurred in making such proof (§ 2033.420, subd. (b)).[7]

For these reasons, the trial court did not abuse its discretion in denying the section 2033.420 motion as to anything Defendants might have proven *at trial*.

However, Defendants made a different showing with regard to their *pretrial* demurrer, which the trial court sustained without leave to amend as to Plaintiff's third cause of action for conversion. We next discuss the cause of action for conversion.

b. *Defendants Did Not Isolate Any Actual Costs Incurred in Proving the Matters Associated with the Conversion Cause of Action*

In support of their section 2033.420 motion in the trial court, Defendants described their requests for admission Nos. 23-25 as seeking Plaintiff's admission that he "did not

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7 The bulk of Defendants' presentation on appeal is directed to what they contend is *Plaintiff's* failure in the trial court to have established an exception to the mandatory award of reasonable expenses incurred Defendants for having proved at trial the truth of a matter denied by Plaintiff. However, since Defendants did not prove the truth of a matter denied by Plaintiff, as required by *subdivision (a)* of section 2033.420, we do not reach, and thus do not express an opinion regarding, the sufficiency of Plaintiff's showing under *subdivision (b)* of section 2033.420.

own the money or right to possession of moneys allegedly converted."[8] Despite Plaintiff's denials of the requests, the trial court sustained without leave to amend Defendants' demurrer to Plaintiff's cause of action for conversion. The court ruled that, to state a cause of action for conversion, a claimant like Plaintiff must allege an actual interference with his or her ownership or right of possession to identified property, citing *Del E. Webb Corp. v. Structural Materials Co*. (1981) 123 Cal.App.3d 593, 610-611; yet Plaintiff did not and could not allege that any of the money Plaintiff claimed Defendants converted—namely "business expenses and excess management fees"—ever belonged to Plaintiff, as opposed to the corporation or joint venture that was running the business. Under section 2033.420, Defendants sought their costs of proving—in the demurrer proceedings—that Plaintiff unreasonably denied the three identified requests for admission.

Neither the parties' briefing nor our independent research has disclosed authority that allows (or disallows) a section 2033.420 motion following demurrer proceedings. Nonetheless, for purposes of this part of the opinion, we will assume without deciding that a defendant's showing in support of a demurrer may form the basis of a

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[8] Request for admission No. 23 asked Plaintiff to admit: "Plaintiff did not own the money which he alleges in the third cause of action was the subject of conversion by defendants, at the time said money was allegedly converted."

Request for admission No. 24 asked Plaintiff to admit: "The money that was allegedly converted, was owned by defendant B.L.E Fish Inc., dba Tin Fish Gas Lamp at the time said money was allegedly converted."

Request for admission No. 25 asked Plaintiff to admit: "Plaintiff had no right to possession of the money which he alleges in the third cause of action was the subject of conversion by defendants, at the time said money was allegedly converted."

section 2033.420 motion. We will further assume without deciding that, in fact, based on the court's ruling sustaining the demurrer on the basis that the money allegedly converted never belonged to Plaintiff, Defendants *proved* the truth of the matters Plaintiff denied in his responses to requests for admission Nos. 23-25 (set forth at fn. 8, *ante*).

Nonetheless, the trial court did not err in failing to award costs of proof sanctions for the three requests (Nos. 23-25), because, as applied to the demurrer, the record supports the court's ruling that Defendants failed to "isolate[] the actual costs to prove specific facts."

As we introduced *ante*, Defendants (as the party seeking to recover costs of proof) had the *initial* burden of presenting evidence of their "reasonable expenses incurred in making that proof" following Plaintiff's failure to admit the requests at issue. (§ 2033.420, subd. (a); Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶ 8:1413.1, p. 8G-39; *Garcia*, *supra*, 28 Cal.App.4th at p. 737.) An award of costs of proof is limited to "reasonable expenses . . . , including reasonable attorney's fees[,]" incurred in proving the matters unreasonably denied. (§ 2033.420, subd. (a).) Under this standard, such an award may include *only* those expenses incurred in proving the specific matter denied. (*Grace*, *supra*, 240 Cal.App.4th at p. 529 [the requested amounts must be segregated from all expenses incurred to prove *other* matters]; *Garcia*, *supra*, 28 Cal.App.4th at pp. 736-737 [only expenses in "proving the matters denied by the opposing party" recoverable]; see *City of Glendale*, *supra*, 235 Cal.App.4th at p. 353 [costs of proof sanctions are " ' " '*an award of expenses . . . not a penalty*' " ' "].)

Here, after Plaintiff denied Defendants' requests for admission Nos. 23-25 (directed to the issue whether, according to Defendants, Plaintiff "own[ed] the money or right to possession of moneys allegedly converted" in Plaintiff's third cause of action), the trial court sustained without leave to amend the third cause of action for conversion. However, the court overruled Defendants' demurrer as to the remaining three causes of action.

In seeking to establish his costs of proof related to the conversion cause of action, Plaintiff's counsel testified that "Defendants were required to prepare for and prove at demurrer . . . the falsity and lack of evidence of [P]laintiff's allegations of his [amended] complaint" and sought a costs of proof award of $4,895 based on 17.8 hours of "work related to demurrer to first amended complaint, supplement and reply to opposition and [court] appearance."[9] We have reviewed Defendants' counsel's itemized invoices and are confident that they refer exclusively and consistently to the demurrer to the amended complaint *in its entirety* and not to the specific cause of action for conversion.

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9 In full, Plaintiff's counsel described the 17.8 hours as follows: "The demurrer was based upon the inconsistent allegations that the entity that purchased and operated the business was a joint venture or partnership, yet also recited that the entity was a corporation; that the claim was against the law under the holding of Persson v. Smart (2005) 125 Cal.App.4th 1141, 1157; that the Corp[orations] Code section recited in the complaint allowing for dissolution had been repealed; and that conversion failed as that the allegedly misappropriated funds were corporate funds, not those of plaintiff. [*Sic*.] The court granted the demurrer to the conversion cause of action; and deferred to triable issues on the remaining claims." Based on these descriptions—in particular, the references to *Persson*, *supra*, 125 Cal.App.4th 1141, and a statute related to corporate dissolution—counsel necessarily included services related to matters *other than* the third cause of action for conversion.

By requesting an award of all attorney fees incurred in the demurrer proceedings, Defendants sought not only expenses incurred in defeating the conversion cause of action—i.e., in proving the truth of the matters that Plaintiff unreasonably denied in his responses to requests for admission Nos. 23-25—but also expenses incurred in their *unsuccessful* efforts to defeat three other causes of action. These latter expenses—which did not result in proving the truth of anything, let alone something Plaintiff had denied—are not compensable under section 2033.420. (*Garcia, supra,* 28 Cal.App.4th at p. 737.)

Accordingly, the trial court did not abuse its discretion in denying the section 2033.420 motion on the basis that Defendants failed to "isolate[] the actual costs to prove specific facts."

B. *Plaintiff's Cross-Appeal: Plaintiff's Request for Sanctions (§ 128.7, Subd. (h))*

The July 14, 2017 minute order denying Defendants' motion—brought in part under section 128.5 (sanctions for prosecuting a frivolous action)—does not mention Plaintiff's responsive request for sanctions under section 128.7, subdivision (h). In his cross-appeal, without citation to any authority other than section 128.7, subdivision (h), Plaintiff argues that, because Defendants called Plaintiff's case "frivolous" in their section 128.5 motion, "sanctions against [Defendants] are warranted, at the trial level." As we explain, Plaintiff is not entitled to consideration of the merits of his substantive argument on appeal.

In relevant part, section 128.7, subdivision (h) provides that, where a party brings a section 128.5 sanctions motion "for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation," the section 128.5

sanctions motion "shall itself be subject to *a motion for sanctions*." (Italics added.) Plaintiff quotes this statute in his appellate brief, but fails to suggest how or where he made "a motion for sanctions" as required by section 128.7, subdivision (h). Consistently, the record on appeal does not contain "a motion for sanctions," and Plaintiff does not suggest otherwise. Instead, in his opposition to Defendants' section 2033.420 motion, Plaintiff merely included a "*request[]*" that the court award him $11,350 for attorney fees against Defendants and their attorneys for bringing a section 128.5 motion "which is frivolous and lacking in merit." (Italics added.)

Very simply, among other procedural requirements that Plaintiff's request did not meet here,[10] section 128.7 mandates that "[a] motion for sanctions under this section shall be made separately from other motions or requests." A motion is not an informal request contained within an opposition. Rather, "the papers filed in support of a motion *must* consist of at least the following: [¶] (1) A notice of hearing on the motion; [¶ and] (2) *The motion itself* . . . ." (Cal. Rules of Court, rule 3.1112(a), italics added.) Thus,

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10 For example, section 128.7 contains a "safe-harbor" provision that Plaintiff does not mention: "Notice of [a section 128.7] motion shall be served as provided in Section 1010, but shall not be filed with or presented to the court unless, within 21 days after service of the motion, or any other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." (§ 128.7, subd. (c)(1).) Under this subdivision, sanctions are not available where the section 128.7 motion is not served at least 21 days before filing it. (*Muller v. Fresno Community Hospital & Medical Center* (2009) 172 Cal.App.4th 887, 906; *Martorana v. Marlin & Saltzman* (2009) 175 Cal.App.4th 685, 700 [because the notice requirements of § 128.7, subd. (c)(1), are "mandatory," neither the parties nor the court may disregard them].) As applicable here, Plaintiff's failure to comply with this requirement is an alternative basis on which to affirm the trial court's (implied) denial of Plaintiff's motion. (See *Muller*, at pp. 906-907 ["It is the ruling, and not the reason for the ruling, that is reviewed on appeal."].)

Plaintiff's mere *request* for sanctions here " 'cannot serve as a substitute to the requirements set forth in section 128.7 for a formal noticed motion.' " (*CPF Vaseo Associates, LLC v. Gray* (2018) 29 Cal.App.5th 997, 1007.)

For this reason, the trial court did not err in declining to rule on—and, by implication, in denying—Plaintiff's request for section 128.7, subdivision (h) sanctions.

DISPOSITION

The trial court's July 14, 2017 minute order denying Defendants' motion for attorney fees is affirmed, and the court did not err in declining to rule on Plaintiff's request for sanctions under section 128.7, subdivision (h). The parties shall bear their respective costs on appeal in both Defendants' appeal and Plaintiff's cross-appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

IRION, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.